

## Economic Growth and Property Rights in China: the Role of Courts in Filling Legislative Gaps and Balancing Competing Interests

Mugelli, Caterina

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**ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK**  
CENTRE OF EUROPEAN LAW AND POLITICS

University Bremen

**ZERP**

**Caterina Mugelli**

**Economic Growth and Property Rights  
in China: The Role of Courts  
in Filling Legislative Gaps and Balancing  
Competing Interests**

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This study is part of a wider research project that started in 2012 on the occasion of the workshop ‘Law, Governance and Development: The Transformation of Property Rights in Land and Property Law in China’ at the School of Oriental and African Studies, London.

## **Editorial**

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## **Abstract**

Property ownership is a cornerstone of the Western legal tradition. Over the years it has become one of the basic rights in a given society, especially for the so-called rule-of-law countries, due to the fact that it has a great impact on the rights of every citizen.

Nevertheless, property law also has an influence on economic growth and the case of China is pivotal. Paying particular attention to property rights related to land, this paper critically traces the legal evolution of property law in China and underlines its controversial aspects and the assistance that people's courts could guarantee to potentially solve some of the issues related to property.



## 1. Introduction

In the aftermath of Mao Zedong's death, the People's Republic of China experienced unprecedented economic growth together with a massive process of legal reform. The aim of this paper is to reconstruct the complex legal developments which have accompanied the unprecedented economic growth in the last decades, explore the impact of these developments on some particular aspects of the legal-economic context, and shed some light on the role Chinese Courts could play in solving related issues.

The paper is divided into four main parts. First, I will compare the Western and Chinese legal traditions regarding the concept and function of property. Second, I will critically investigate the complex legislative developments in judicial reform in the post-Mao period which have contributed to shaping the Chinese legal system. Third, I will focus on the evolution of property rights in China, looking at the development of the most relevant constitutional articles and of the pertinent legislation. Finally, I will discuss the potential role of the judiciary in interpreting and implementing these rules in order to contribute to establishing a virtuous circle between the people's trust in the legal system, a reliable judiciary and sustainable economic growth.

## 2. General Assumptions of Property Law: A Comparison Between the Western Legal Tradition and the Chinese Legal System

In the civil law tradition, the concept of property could be compared to a Jack-in-a-box. When closed up in the box, Jack provides little enjoyment, but opening the box and letting Jack spring out gives full enjoyment. This is similar to an owner of property having to respect third-party rights (the so-called real rights concept) to his property (i.e. sharing it with others), while giving full ownership to the owner is like removing these real rights and ensuring, therefore, the right of the owner to exclude others and fully enjoy his/her property. The theory was well-summarized in article 544 of the French Civil Code of 1804 (the Napoleonic Code), which is the basis of the civil law tradition and therefore of most European/continental civil codes. Article 544 states "*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.*" To understand the impact of this concept over the centuries it is sufficient to look through the French Civil Code's table of contents and see that property and freedoms – for instance contractual freedom – were and still are the core concepts of this legal text. In fact, two of the three (now four)

books of the Napoleonic Code are dedicated to different aspect of ownership. The second book of the French Civil Code is entitled “*Des Biens, et des différentes modifications de la propriété*,” and the third one “*Des différentes manières dont on acquiert la propriété*.” Understanding the different ways of modifying or acquiring ownership allows a better understanding of the relationship between the notion of ownership and that of free will. This relationship, in particular with regard to contractual freedom, can be clarified by analysing the economic function of property. Generally speaking, the possibility of privately owning and exchanging things is the basis of trade, and indeed of the whole economy.

The reason why property rights played and still play an important role in a given society is therefore their strong association with economic growth. In particular, selling, borrowing, lending and establishing real rights over private property is one of the key elements of economic growth, and actors usually feel safer and more willing to do business where a general and understandable theory of property rights exists and is protected and implemented fairly.<sup>1</sup> Contracts are usually the means by which goods and the rights related to these goods circulate within or between societies, while the court system assures contractual stability. Indeed, property law became enshrined in the continental constitutions adopted for the most part in the post-Second World War period.<sup>2</sup>

Taking into account the interest of the state in this matter, it is easy to understand that each country has an interest in protecting people’s property rights. By and large, the Western legal tradition relies on a well-established system of property rights with private property as the core element, and puts trust in the protection of these rights in the hands of an independent court system (at least in theory). By doing so, each state attempts to satisfy both the social and the economic functions of property law.

Property law, therefore, seems strictly connected to the court system, and for the so-called developing countries the instrumentality of property rights in achieving economic growth is deemed to require political change enabling the establishment of an independent judicial power.<sup>3</sup>

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1 An interesting collection of articles can be found in Epstein, RA (Ed) (2007) *Economics of Property Law*, Edward Elgar Publishing.

2 For instance, Article 41 of the Italian Constitution (1948); Article 34 of the French Constitution (1958); Article 14 of the Basic Law of the Federal Republic of Germany (1949).

3 Peerenboom, R (2004) ‘Varieties of rule of law: an introduction and provisional conclusion’ in Peerenboom, R (ed) (2004) *Asian Discourses of Rule of Law*, Routledge 1.

China's unprecedented growth was unexpected for several reasons. First of all, for a socialist country focused on public ownership, conventional wisdom saw such growth as basically impossible. Second, even though public and collective ownership were considered the basis of China's socialist economic system, the country lacked a clear theory of property rights. Finally, China lacked legal institutions and a class of legal professionals, especially in the wake of the Cultural Revolution (1966-1976). China seemed, therefore, to lack the environment usually perceived necessary for economic growth, or at least for lasting economic growth.

However, the Chinese legal system, which is often considered young and inconsistent, seems able to completely overturn some of the Western certainties. Several circumstances would seem to have helped China's unprecedented economic growth. In fact, interestingly, it has been argued that it was precisely the absence, or rather the vagueness, of a detailed definition of property law rights and the lack of a competent independent professional judiciary that formed the basis for this growth.<sup>4</sup> With foreign investment playing a dominant role in China's growth, the advantages of doing business in China were so massive that the risks associated with the weak protection of property rights were ignored. While this is certainly true, it is also true that the situation was to the detriment of Chinese workers, whose civil rights, and in particular property rights, remained more often than not totally unprotected.

China's growth also challenged the idea that actors (especially foreign businessmen) feel safer where a general doctrine of property rights and their protection exist. What is plausible is that Western investment, especially at the beginning of China's 'open-door policy,' took advantage of this situation. It was not until 2007 that the National People's Congress of the People's Republic of China formally adopted the Real Rights Law (also known as the Property Law), which officially puts the protection of private property on a par with that of state/public and collective property, the fundamental pillar of a socialist country like China.<sup>5</sup>

This emblematic change has been considered by many to be a historical shift and a great step forward in 'China's Long March Toward Rule of Law.'<sup>6</sup> This march, which on paper started in 1999 after the third Chinese constitutional amendment, was in fact preceded by other legal reforms.<sup>7</sup> It is plausible

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4 Upham FK (2009) 'Chinese Property Rights and Property Theory' in Vol. 39 *Hong Kong Law Journal* pp. 611-625, at p. 612.

5 Real Rights Law of the People's Republic of China, 2007 art. 39.

6 The expression derives from the title of the book by Peerenboom, R (2002) *China's Long March Toward Rule of Law*, Cambridge University Press.

7 Article 5 of the 1982 Chinese Constitution after its amendment in 1999 states: 'The

that the perceived imminence of such political and legal changes facilitated foreign investment. Looking at the whole Chinese legal context, it is possible to discern that the fast economic growth has been accompanied by a parallel legal reform, which over the last decades has become significant and which directly involved the main pillars of the legal system, and indirectly helped the economic escalation.

### **3. China's Unprecedented Economic Growth and the Reform of the Legal System**

In the aftermath of the so-called 'legal nihilism' of the Cultural Revolution (1966-1976), China's new leadership was quick to distance itself from the excesses of Mao's policies, declaring a new role for law. Law was considered necessary to rule the country, a necessary tool to 'open the door' to the rest of the world and transform communist China into a world power in the first stage of socialism. Under the catchphrase "I don't care if it's a white cat or a black cat. It's a good cat as long as it catches mice," Deng Xiaoping's pragmatism laid the basis for China's growth.

Nevertheless, the legacy of the previous leadership was still to be noticed. Pivotal principles such as democratic centralism and the dual dependence system remained (and still remain) fundamental. According to these principles, there is a need for centralisation in the administration to be replicated at all sub-administrative levels, allowing the National People's Congress and its Standing Committee at the national level and the Local People's Congresses and their respective Standing Committees at the local level to appoint and dismiss people in leading positions, for instance Court presidents and ordinary judges. In doing so they take account of political loyalty, or at least make sure that candidates are acceptable to the Party, which continues to give the lead. The dual dependence system basically means that control is not only exercised 'top-down' from the national level to the local level and within the people's congress or the court system, but also horizontally, meaning that at each level the people's congress exercises control over the court at the same level. This is based on the principle that a people's congress is, at least in theory, the voice of the people.<sup>8</sup>

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People's Republic of China governs the country according to law and makes it a socialist country under rule of law.'

8 See the Preamble and articles 2, 62, 63, and 67 of the Constitution of the People's Republic of China; and Van Rooij, B (2002) 'Appendix II China's System of Public Administration,' in Chen, J, Li Yuwen and Otto, JM (eds) (2002) *Implementation of Law in the People's Republic of China*, Kluwer Law International.

In the first 20-25 years, Chinese reform was mainly a top-down affair, even if, due to the country's size and its complicated administrative stratification, some reform experiments were tried out in practice before being codified.<sup>9</sup> The case of China is emblematic, even though it is common knowledge that legal reforms usually lag behind economic development. One of the first laws enacted concerned equity joint ventures (1979), a clear indication that legal reform was to play a key role in facilitating economic growth. Providing instruments such as a legal basis to create Sino-foreign joint ventures and wholly foreign-owned companies was a clear indication of a dominant intention to build a well-functioning investment system rather than establish a comprehensive legal system.<sup>10</sup>

Other parts of the new legislation were indirectly involved in such growth. For instance, the effort invested in rebuilding the court system, its procedural rules, and the legal professions was aimed at building a more trustworthy legal system more in line with international standards. Nevertheless, the reforms were also indirectly helpful in promoting economic growth, as a legal system worthy of its name can be considered instrumental in attracting foreign investors. In this regard, its provisions could also compete in shaping China's legal system and to a certain extent state behaviour.<sup>11</sup>

The perceived importance of legality, together with Deng's pragmatism, saw many other laws being enacted in the following years with twofold results: on the one hand they encouraged economic growth with specific legislation, and on the other hand they were building a comprehensive and reliable legal system. As far as the latter result is concerned, the judicial institutions – and consequently a class of professional jurists – needed to be re-built after having been closed down during the Great Revolution. Prior to the adoption of the current Constitution in 1982, explicitly declared to be the country's supreme law, the Organic Law of the People's Courts (OLPC) came into force in 1979 and established the overall structure of the Chinese court system, underlining the principle of judicial independence.<sup>12</sup> In accordance with Article 3 of the

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9 Heilmann, S (2011) 'Policy-Making through Experimentation: The Formation of a Distinctive Policy Process' in Heilmann, S and Perry, EJ (eds) (2011) *Mao's Invisible Hand. The Political Foundations of Adaptive Governance*, Harvard University Press 62.

10 Lubman, SB (1999) *Bird in a Cage. Legal Reform in China after Mao*, Stanford University Press at 192.

11 Liebman, BL (2011) 'A Return to Populist Legality? Historical Legacies and Legal Reform,' in Heilmann, S and Perry, EJ (eds) (2011) *supra* n 9 at 165.

12 Article 4, Organic Law of People's Courts 1979 (amended in 1993 and 2006). In reality, these laws were not completely new. The first period of Mao's leadership had seen enactments of laws inherited from the Kuomintang period, mainly based on

OLPC, the task of people's courts is *inter alia* to uphold the socialist legal system and public order and to educate citizens in loyalty to their socialist motherland and respect for the Constitution and the law.<sup>13</sup>

Another indication of the importance of legality at that time was the 1989 enactment of the Administrative Procedure (or Litigation) Law, which had the stated purpose of

*“safeguarding correct and timely adjudication of administrative cases, protecting the lawful rights and interests of citizens, legal persons and other organizations, and upholding and inspecting the exercise of administrative power in accordance with law by administrative organs” (Art. 1).*

Last but not least, it is important to take into due consideration the laws governing the legal professions, i.e. the 1996 Lawyers Law (amended in 2001 and 2007) and the 1995 Judges Law (amended in 2001), enacted to enhance quality in these professions.<sup>14</sup> In particular, these legal reforms affected the status of the judiciary. Where legislation is vague and flexible, the judiciary can be considered of great importance in defending people's rights, if they have proper experience. However, back in 1979 when the Organic Law of the People's Courts was enacted, there was no requirement for a judge to possess any legal education. In 1995 the National People's Congress adopted initial legislation strengthening judicial independence and judicial professionalism, but it was only in 2002 that the 2001 amendment of the Judges Law entered into force making the National Judicial Examination mandatory for those wanting to become judges.<sup>15</sup> The upgraded status of judges is also reflected in the change of the term used to refer to them. In the 1979 Law and its subsequent amendments, judges used to be called *shenpanyuan* 审判员, which literally means a 'person in charge of a decision', while the more recent term *faguan* 法官 has the more prestigious meaning of 'an official of the law' and was used for the first time in the 1995 Judges Law.

The reform peaked with the introduction, as a result of the 1999 third Constitutional amendment, of the rule-of-law principle (*fazhi* 法治) into the Chinese context. Although its introduction could again be considered instrumental

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Western models and principles. For example, an earlier Organic Law of the People's Courts was enacted in 1950.

13 In 1978 the third Constitution of the People's Republic of China was adopted to mark the distance from the 1975 Constitution born under the Cultural Revolution. Nevertheless, major changes were made in 1982 with the adoption of the present Constitution.

14 See the bilingual legislative and constitutional text available on <<http://www.lawinfochina.com>>.

15 Article 12, Judges Law of the People's Republic of China (1995, amended in 2001).

to economic growth, paving the way for the People's Republic of China to finally become a member of the World Trade Organisation (WTO) in 2001 following fifteen years of negotiation, it is undoubtedly true that the central government was at least outlining some general principles apt to foster a rights-based legal evolution.<sup>16</sup>

The introduction of a socialist rule of law is not the only reason why 1999 was a year of fundamental importance in China's economic and legal development. The same year saw the first of four 5-year judicial reform plans issued by the Supreme People's Court. Those documents underline the key role of the central government in pushing forward these reforms, apparently intent on marking a dividing line distancing itself from the revolutionary past.<sup>17</sup>

These documents also demonstrate central-level awareness of some of the main weaknesses of the legal system in general. Although the flexibility, vagueness, and sometimes inconsistency and overall weak implementation of these laws are undeniable, their enactment itself can be seen as an indication that the legal system was not a passive actor. The legal system foresaw the co-existence of different elements, such as judicial independence on the one hand, and the nomenclature system for appointing judges on the other. However, the fact that law can be used for purposes that at times are at odds with the instrumental goals of the state did not mean that China was transitioning to a Western-style rule of law. Core rule-of-law concepts such as treating like cases alike and predictability of the application of law are not fundamental concepts in the socialist rule of law introduced by China at the turn of the century.<sup>18</sup>

These legal reform efforts saw many scholars thinking about unavoidable political reform. However, in a continuous interplay between formal and informal institutions, and written legislation and its inconsistent implementation, the idea is now being reconsidered. As underlined in the book edited by Elizabeth J. Perry and Sebastian Heilmann, *Mao's invisible hand. The political foundations of adaptive governance in China*, the keywords of China's unprecedented growth are political resilience and adaptability of governance. In their words, 'political resilience' refers to "the capacity of a system to experience and absorb shocks and disturbances while retaining essentially the same function, structure, feedbacks and therefore identity," while 'adaptability of

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16 Dillon, N (2011) 'Governing Civil Society: Adapting Revolutionary Methods to Serve Post-Communist Goals,' in Heilmann and Perry, *supra* n 9 at 158.

17 An English description of the first two plans, (1999-2003 and 2004-2008) can be found in Chen, J (2008) *Chinese Law: Context and Transformation*, Martinus Nijhoff Publishers, at 155 ss. An English translation of the third plan (2009-2013) is available at <<http://www.lawinfochina.com>>.

18 Liebman *A Return to Populist Legality?* *supra* n 11 at 186-187.

governance’ refers to “the capacity of actors in a system to further resilience through their actions and interactions, intentionally or unintentionally.”<sup>19</sup>

This situation on the one hand led to fast and apparently lasting economic growth, but also to a wider urban-rural gap facilitating corruption and local protectionism under the catchphrase ‘To get rich is glorious,’ without any substantial political reform. Generally speaking, China entered an “age of statutes”<sup>20</sup> – oriented towards the West yet in a context still dominated by the socialist principles of democratic centralism and the leading role of the Chinese Communist Party, but it was instrumental in achieving economic growth. This pragmatism of legal reform in setting the stage for economic growth can be seen in the development of property law.

## **4. The Evolution of Property Law in China**

### *4.1. The Scope of Property Law in China Before 1978*

Until the Kuomintang (or National Party) came into power, civil law, and therefore property rights, was traditionally left to rites and customary law applied within families, clans, or villages. After the collapse of the Empire in 1911, the newly-founded Republic of China led by Sun-Yat-Sen became convinced of the inadequacy of Chinese law following the stipulation of the Unequal Treaties as a consequence of the Opium Wars and the removal of Chinese jurisdiction under the extraterritoriality clauses, and therefore it perceived the need to modernise the country.

The Republic of China and, as of 1927, the National Party started looking at Western legal traditions, with the result that the so-called six codes of the 1930s, among them the civil law code, were mainly based on German law. However, the six codes remained in force for too short a period for their principles to become enrooted in the Chinese context.<sup>21</sup> The Kuomintang, in particular, focused its attention much more on the big cities and its policies had only a minimal influence on rural areas, thus greatly expanding the urban-rural gap. The lack of interest in peasant China ended in a debacle, with the Nationalists powerless against the Chinese Communist Party led by Mao Zedong.

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19 Heilmann, S and Perry, EJ (eds) (2011) *Mao’s Invisible Hand. The Political Foundations of Adaptive Governance*, supra n 9.

20 The expression comes from Guido Calabresi’s book *A Common Law for the Age of Statutes* (1985), Harvard University Press.

21 Muhlemann, G (2011) ‘China’s Multiple Legal Traditions. An Overview’ in Tomasek, M and Muhelmann, G (2011) *Interpretation of Law in China – Roots and Perspectives*, Karolinum Press, 43 at 68.



Mao was quick to understand the importance of the peasantry in the conquest of power, and easily gained their support for the revolutionary cause during the Long March. On 1 October 1949 Mao founded the People's Republic of China (PRC).

As far as property rights regarding land were concerned, one of Mao's major policy interventions came in 1958, when an experiment previously confined to Henan province was replicated throughout China. This was the so-called Great Leap Forward, under which the countryside was divided into communes. Each commune was made up of five thousand households, and "all would contribute to the commune according to the best of his or her ability and receive food and all the basic necessities of life in return." The Chinese were deprived of their personal goods and their work was focused mainly on industrial advancement. However, such a regime was not suited to agricultural production, as can be seen from the resulting famine which caused thirty million deaths.<sup>22</sup> Just as the attempt to bring industrialisation to the countryside was a failure, the attempt to send professionals and city-dwellers to the countryside "to learn from the peasants" in the following decade similarly failed. Mao's idea of a Great (or Cultural) Revolution reducing the economic and cultural urban-rural gap turned out to be his second failure.<sup>23</sup>

The end of the Cultural Revolution, conventionally established to have taken place in 1976, the year of Mao's death, is generally considered the end of an era, a turning point in the People's Republic of China (PRC)'s history. In reality, principles already established, such as democratic centralism, the leading role of the Party, and public ownership as the basis of the socialist economy, remained pivotal even under the post-Mao leadership.<sup>24</sup> It is therefore of interest to look at how property rights evolved under such variegated and sometimes opposing circumstances.

When Deng started to modernise the country and build a more reliable legal system, property rights could not be ignored. The main difficulties involved upholding fundamental socialist principles while at the same time promoting economic growth and opening the door to the rest of the world. Against the background of Mao's failures (the Great Leap Forward and the Cultural Revolution), the post-Maoist leadership shifted attention away from the rural areas to the coastal metropolises. This inevitably resulted in a further widening of the urban-rural gap over the years. Even though Deng Xiaoping was responsi-

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22 James, BW (2006-2007) 'Expanding the Gap: How the Rural Property System Exacerbates China's Urban-Rural Gap' (20) *Columbia Journal of Asian Law*, 451 at 459-460.

23 Ibid.

24 The preamble of the Chinese Constitution is in this sense emblematic.

ble for the de-collectivisation of urban areas, reversing the devastating and failed revolutionary reforms of the Great Leap Forward, the major benefits of his policies accrued to the coastal and richer cities and provinces, where so-called Special Economic Zones (SEZ) were established. The new leadership thus shifted its sights from the countryside, the birthplace of the original Communist revolution, to the richest towns and provinces, the symbols of China's unprecedented economic growth.

Together with this comprehensive development process, it is possible to notice a specific reform process in the field of property law. In particular, understanding of how the Chinese legal reform was able to maintain the centrality of public and collective ownership while at the same time promoting extraordinary economic growth can be inferred from both the Constitution (including its four amendments of 1988, 1993, 1999, and 2004) and Chinese legislation.

#### 4.2. *Property and Reform of Constitutional Principles in China*

As far as constitutional principles are concerned, it can be argued that the 1982 Constitution followed the same lines as the previous Maoist constitutional principles (1954, 1975), the centrality of public ownership being one of them.<sup>25</sup> In fact, when discussing property rights in China, public and collective ownership is the starting point. Before its four amendments (1988, 1993, 1999, 2004), the 1982 Constitution originally stated that

*“The basis of the socialist economic system of the People’s Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people” (Art. 6),*

and the “state economy [...] is the leading force in the national economy. The state ensures the consolidation and growth of the state economy” (Art. 7). Strict respect of these principles was hardly a way to foster the growth of China's gross national product (GNP).

A chronological analysis of the constitutional amendments underlines the instrumentality of property rights in promoting economic growth, even if much effort was put into maintaining consistency with ideological principles. Since 1988, the first seventeen articles of the 1982 Constitution have been subject to many changes. By comparing the original texts with the ensuing amendments, I will underline the most significant changes with regard to property.<sup>26</sup> The

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25 English translations of the 1954 and 1975 constitutions are available respectively at <<http://e-chaupak.net/database/chicon/1954/1954ae.pdf>> and <[http://www.leggcines.it/view\\_doc.asp?docID=586](http://www.leggcines.it/view_doc.asp?docID=586)>.

26 The following paragraphs use the English translation of the 1982 Constitution and amendments available at <<http://www.lawinfochina.com>>.

evolution of the twice-modified (in 1988 and 2004) Article 10 is certainly significant. The original article specified that “[l]and in the cities is owned by the state [and l]and in rural and suburban areas is owned by collectives” and ruled out the possibility of organisations and individuals appropriating, buying, selling or otherwise engaging in the transfer of land by unlawful means. However, the 1988 amendment not only allowed land to be leased but, more importantly, an additional paragraph explicitly declared that the right to use the land could be legally transferred as long as the interests of society and the public were not jeopardised.<sup>27</sup> Developing the provision that “[t]he state may, in the public interest, requisition land for its use in accordance with the law,” the 2004 amendment added a certain amount of protection, stipulating that compensation was to be paid when expropriating or taking over land.

Article 11 has similar pivotal importance. Its continuous development since 1982 dealt with a further crucial subject: the ‘individual’<sup>28</sup> economy of urban and rural working people. The centrality of this article is shown by the fact that it was modified by all the constitutional amendments but one, namely that of 1993. Although antagonism to the word ‘private’ was still evident in the original text, the 1988 amendment allowed the existence and development of a private sector as a complement to the socialist public economy, but under state guidance, supervision, and control. As a result of the 1993 shift from a planned economy to a socialist market economy, Article 11 was again amended in 1999, with the non-public sector of the economy being declared an important component of the socialist market economy under the guidance, supervision and control of the state. In 2004 the article was again amended, this time adding that the State not only exercises control, supervision and guidance over the non-public sector of the economy, but also encourages and supports it. By and large, the private sector evolved over the years from being the strictly controlled exception, via complementing the public economy, to finally becoming an important component encouraged and supported by the State itself.

While the private sector was dealt with in three of the four constitutional amendments, another pivotal article, Article 6 on collective ownership, remained basically untouched. In fact, in its current form it still states that the basis of the socialist economic system is socialist public ownership, but to justify the aforementioned evolution of the ‘non-public economy’ in 1999 a para-

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27 The texts of the constitutional amendments are available at <<http://www.lawinfochina.com>>; see also Mo Zhang (2008) ‘From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China’ in (5) *Berkeley Business Law Journal* 317 at 336.

28 At that time, hostility to the term ‘private’ was still present. The word ‘individual’ appears to be less politically compromising.

graph was added to clarify that

*“In the primary stage of socialism, the State upholds the basic economic system in which public ownership is dominant and diverse forms of ownership develop side by side, and keeps to the distribution system in which distribution according to work is dominant and diverse modes of distribution coexist.”*

In 1990 the Interim Regulations of the People’s Republic of China Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas were, in fact, issued as a way of promoting urban construction and economic development. The focus on urban land is also demonstrated by the Law on Urban Real Estate issued by the Standing Committee of the National People’s Congress in 1995 (and amended in 2007) with the purpose of safeguarding the real estate market order and protecting the lawful rights and interests of real estate owners.<sup>29</sup>

Although the cunning of the first constitutional amendment of 1988 allowed meaningful outcomes in urban areas by permitting transfers of the valuable right to use land, it brought no such advantages to rural areas, where the legal owners of the land were the collectives and where the transfer of rural land designated to remain farmland brought much less profit. In this respect, Article 8 is of great importance. Its original wording still envisaged collective ownership by the working people as part of the socialist economy, giving working members of rural economic collectives the right to farm plots of cropland and hilly land for their private use. In particular, collective ownership covered rural people’s communes, agricultural cooperatives and other forms of cooperative economy. In 1993 the so-called household responsibility system (HRS) in rural areas was officially included in the constitutional provisions (even though it was already amply used in practice during the 1980s), with the household contract becoming its main form. In 1999 the article was again modified to now state that rural collective economic organisations apply a dual system characterised by a combination of centralised and decentralised operations on the basis of a household operating contract.

In view of the fact that Chinese constitutional principles are not directly applicable and enforceable, it is also necessary to take a quick look at the relevant legislation.<sup>30</sup> Constitutional principles become applicable and enforceable when enshrined in ordinary laws, although it should also be pointed out that in many cases constitutional amendments are the result of previous experimenta-

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29 Law of the People’s Republic of China on Urban Real Estate Administration, issue by the Standing Committee of the National People’s Congress (1995, amended in 2007) English translation available at: [www.lawinfochina.com](http://www.lawinfochina.com).

30 For the development of the Chinese constitutionalism, see Balme, S and Dowdle, MW (eds) (2009) *Building Constitutionalism in China*, Palgrave Mcmillan.

tions.

### 4.3 *Legislative Reform of Property Law*

The 1986 General Principles of Civil Law are the first laws in which a more general doctrine of property rights is to be found. Regarding goods, citizens are only allowed to personally own consumer goods, while the means of production are owned by the state or other collective organisations. As a socialist country, China incorporated the socialist definition of goods centred on their economic function.<sup>31</sup> Regarding land, the household responsibility system, enshrined in 1993 in the Constitution on account of its positive practical effect on agriculture, was reflected in legislation with the 1998 Land Administration Law (LAL), one of the aims of which was to provide real protection to cultivated land as a way of promoting the sustainable development of the socialist economy (Art 1). The system seemed to succeed for two main reasons. On the one hand, it allowed individual families to take care of ‘their’ land, while on the other hand the system gained legitimation through contracts, an instrument known and applied even in traditional China.<sup>32</sup>

Notwithstanding the initial success of the system, several issues began to arise over the years, revealing its weaknesses. First, the right to use land was limited. Second, local government was allowed to redistribute the land in accordance with a village’s changing demographics, and, last but not least, there was an upsurge in the illegal practice of selling the right to use rural land for urban purposes for profit. The primacy of state ownership is mainly marked by the fact that rural land, if it is to be used for non-rural purposes, needs first to be converted into state-owned urban land through expropriation/requisitioning.<sup>33</sup>

The two main pieces of legislation enacted to protect household rights were the 1998 Land Administration Law and the 2002 Rural Land Contracting Law.<sup>34</sup> The 1998 Land Administration Law sought to solve at least part of the problem by increasing land tenure to 30 years, thus stimulating long-term in-

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31 Epstein, EJ (1989) ‘The Theoretical System of Property Rights in China’s General Principles of Civil Law: Theoretical Controversy in the Drafting Process and Beyond’ in 52 *Law and Contemporary Problems* 177.

32 Erie, MS (2007) ‘China’s (Post-) Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings’ in (37) *Hong Kong Law Journal*, 919 at 928.

33 Id at 929.

34 Ibid and James *Expanding the Gap* supra n 22 at 467 ss. Legislation available at <<http://www.lawinfochina.com>>.

vestment in the land peasant households used, establishing a contractual basis between the collective and the households in question, and clamping down on the illegal re-designation of land use. In line with this intention, the 2002 Rural Land Contracting Law attempted to stipulate the reciprocal rights and duties of the contractual parties to avoid land use re-designation (except in particular cases established *ex lege*) and to provide adequate compensation in cases of requisitioning.<sup>35</sup>

The Law on the Contracting of Rural Land issued by the Standing Committee in 2002 to stabilise and perfect the previously mentioned dual system was enacted as a result of the third constitutional amendment and its changes to Article 8. Based on the household system of contracted responsibility for land under overall collective management, the law entitles peasants to a long-term and guaranteed right to the use of the land. The law can be seen as a further effort to improve the development of agriculture and the rural economy and to stabilise rural areas (Art. 1). This major effort is made clear in Article 25. The law's drafters, conscious of the problems of corruption and local protectionism, banned state organs and government officials from taking advantage of their functions and powers to interfere in the conclusion, modification or termination of contracts for rural land. These praiseworthy efforts were not, however, sufficient. Implementation was limited, while on the other hand ongoing economic growth generated a huge exodus to the cities, in turn creating the need to quickly, and sometimes unlawfully, convert neighbouring rural areas into urban land through direct and informal agreements between the buyer and the seller, to the detriment of the peasants who, more often than not, found themselves without a place to stay, without compensation and until recently without a legal basis for protecting their rights.

The need for a more comprehensive statute was perceived in 1993 with the official shift to a socialist market economy.<sup>36</sup> Various experts worked on the

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35 Ibid. Although these laws directly implement such constitutional principles as the possibility to transfer the right to use land, it is possible to find within their articles mechanisms only recently enshrined in the Constitution. One good example is the issue of compensation. Even though Article 2 of the LAL was modified in 2004 to stipulate that when land is expropriated by the state for public interests, the state shall provide commensurate compensation, the original Article 47 of 1998 already listed in detail the cases and conditions under which compensation was to be calculated and paid. Furthermore, any dispute over the ownership of land or the right to its use is to be settled through consultation between the parties concerned; should consultation fail, the dispute is to be dealt with by the people's government at county/township or a higher level, depending on the disputants, for instance whether they are legal entities or individuals. When the government's decision is not accepted by the parties, the court system could be involved (art. 16, LAL).

36 According to the second constitutional amendment (1993) article 15 now states that

new draft for fourteen years and the official result was the widely accepted 2007 Real Rights Law. Even though it is often termed the Property Law,<sup>37</sup> the Real Rights Law is a less misleading name. Bearing in mind the image of a jack-in-the-box, land can be owned by the state (urban land) or by a collective (rural land). Further clarifying the principle enshrined in the ‘living Constitution’ and aforementioned legislation articles, Article 42 of the Real Rights Law specifies that the state is allowed to requisition in the public interest collectively-owned land and premises owned by legal entities and individuals. In both cases compensation must be paid.

By and large, rural land could be expropriated in the public interest after consultation with the interested parties and upon payment of compensation, the amount of which is set in accordance with relevant legislation.

Nevertheless, the Real Rights Law approved turned out to be a 247-article compromise which avoided addressing primary concerns and left room for vagueness and flexible solutions. “The standard for expropriation, the problem of demolishing homes, the language that failed to provide clear meanings of ‘public interest’, ‘reasonable compensation’, the avoidance of the prescribed consultation, and ‘appropriate resettlement’ evoked the sharpest criticism.”<sup>38</sup> Although the 2007 Real Rights Law provided no solution to most of these problems, it does still have some intrinsic merits. The 2007 Law was welcomed for explicitly declaring the inviolability of private property rights. Its importance is demonstrated by the fact that different commissions worked on drafting it, with the fourteen years of debate preceding its enactment reflecting how relevant the subject was considered in the country.<sup>39</sup> Inevitably, the public was involved, and thus another intrinsic merit of this law was that it raised legal awareness among people.

Not quoting Article 149 would prevent light being shed on one of the law’s major innovations. This article stipulates that the right to use construction land for building houses is to be automatically renewed upon expiration of the first 50 years. It is currently too early to see how this provision will work in practice, but it will certainly be very interesting to track its future application.

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‘The State practices a socialist market economy.’

37 Lawinfochina, an important database, for instance, uses the Property Law translation while Real Rights Law is more in line with the Chinese characters.

38 *Erie China’s (Post-) Socialist Property Rights Regime*, supra n 32 at 933.

39 Id at 932-940.

## 5. The Role of Courts in the Present Socio-Economic Context

It has been observed that the reticent behaviour of the courts in solving property disputes had various causes. The strict dependence of courts on the local people's congress at different administrative levels naturally led to courts being involved in corruption and local protectionism. Not only was the appointment and dismissal of judges dependent on the legislative organs at different levels, but also their funding. Such circumstances can easily become an obstacle to impartial and independent judicial judgments.<sup>40</sup>

However, many scholars have pointed to the changes that have come with the legal and judicial reforms in the last ten years or so. This is backed up by the recent official narrative, which has again started stressing the importance of fundamental political principles. The appointment of Wang Shenjun (2008-2013) as the President of the Supreme People's Court, for instance, marked a clear break, distancing the judicial system from the previous President, Xiao Yang (2003-2007). Wang Shenjun was in fact more a politician than a judge, having worked previously in the police and lacking any formal legal education. In one of his speeches he made it clear that the courts should acknowledge first the supremacy of the Party, then the supremacy of popular interest, and finally the supremacy of the constitution and the law, in that particular order (the three supremacies). In so doing, courts should resist foreign influence, as their most important responsibility is to maintain social stability.<sup>41</sup>

At the beginning of October 2012, the Provisions of the Supreme People's Court came into effect. These deal with several issues concerning the handling of cases submitted to the people's courts for the compulsory enforcement of compensation decisions following the expropriation of buildings on state-owned land. Their purpose is to ensure the proper handling of such cases submitted by a city-level or county-level people's government to a people's court.<sup>42</sup> If applied, these provision could partly mitigate the problem of local protectionism. Moreover, the Standing Committee of the National People's Congress issued the Law on Mediation and Arbitration of Rural Land Contracting Disputes in 2009 as a way of settling disputes over the contracted-out management of rural land in a timely and impartial manner, while at the same time maintaining the legitimate rights and interests of the parties concerned

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40 Hawes, C (2006) 'Improving the Quality of the Judiciary in China: Recent Reforms to the Procedures for Appointing, Promoting, and Discharging Judges' in Russel, PH and Malleson, K (eds) (2006) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*, University of Toronto Press 395.

41 Liebman *A Return to Populist Legality?* supra n 11 at 177-178.

42 English translation available at <<http://www.lawinfochina.com>>.



and promoting rural economic development and social stability.<sup>43</sup>

Turning attention to the judiciary, it could be of importance to stress that in 2010 the Basic Standards of the PRC on Professional Ethics of Judges were issued, together with a new Code of Conduct for judges written by the Supreme Court. Although certain provisions sometimes appear trivial, they do reflect the growing status of the legal profession in the state administration.<sup>44</sup> Legislation would have minimal impact if not applied and enforced by the court system. This is the reason why the Chinese judiciary now has a great chance to show its improvements by using, within the limits of its powers prescribed by law, all available room for manoeuvre.

Judicial interpretations could, for instance, be an interesting instrument.<sup>45</sup> Their roots are to be found in the first years of the People's Republic of China. Their legitimacy lies in a mandate issued by the Standing Committee, a legislative body first established in 1951. The mandate was restated in 1981 and after the Cultural Revolution included in Article 33 of the Organic Law of People's Courts. A literal interpretation of the article leads to the conclusion that "specific application of laws and decrees in judicial proceedings" were to be the sole object of such Supreme People's Court interpretations, but it is now generally accepted that a wide and variegated range of laws has been the object of such interpretations, with the latter now being considered para-legislative tools by courts and scholars alike.

Notwithstanding the great perceived importance of the Real Rights Law, it has never been subjected to judicial interpretation. However, another instrument that could be used in order to develop a more consistent context in the field of property law is the guiding case mechanism. This mechanism is a fairly new instrument, and it involves the selection and re-issuing of Chinese court judgements to guide the adjudication of subsequent similar cases, with the aim of assuring the uniform application of the law throughout the country.<sup>46</sup> In

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43 English translation available at <<http://www.lawinfochina.com>>.

44 Basic Standards of the PRC on Professional Ethics of Judges, promulgated by the Supreme People's Court, 12 December 2010, and Code of Conduct for Judges promulgated by the Supreme People's Court the same day. Available at Westlawchina.

45 For an analysis see Dicks, AR 'The Law Making Functions of the Chinese Judiciary: Filling holes in the Civil Law' Reprinted from Edge, I (ed.) (2000) *Comparative Law in Global Perspective: Essay in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department*, Transnational Publications Inc.

46 For more details, see the Chinese Guiding Case project of the Stanford Law School. See also Jin Zhenbao (2011) 'Judicial Interpretation and Envisaged Guiding Case Mechanism in Mainland China' in Tomasek and Muhelmann, *Interpretation of Law in China*, supra n 24 at 143; and Ahl, B (2014) 'Retaining Judicial Professionalism: The New Case Guiding Mechanism of the Supreme People's Court of China' in

2002 several Chinese provinces started experimenting with this mechanism within their jurisdictions. Given its positive results, it was presented in 2005 when the second 5-year judicial reform plan was officially announced by the SPC under the leadership of the Supreme Court President Wang. The rules regarding this mechanism were issued in 2010. On 20 December 2011, the first set of guiding cases was issued. The third set of cases contains a guiding case involving property law. This deals with a case of embezzlement, in which an official takes advantage of his position to obtain land use rights by fraud. Reading the *People v. Yang Yanhu et al.* case, compensation and relocation are obvious consequences. Further guiding cases on appropriate compensation and on the public interest content are now eagerly awaited.<sup>47</sup>

Ever since its announcement, scholars have been developing different theories on this new instrument. Some, for instance, have argued that the mechanism could function as a useful tool to control a judge's interpretative leeway. However, China does not officially declare legal interpretation as a corollary function of judicial power. The lack of widespread recognition of the power to interpret the law by the Chinese judiciary entails a lack of statutory interpretation rules. In other words, the Chinese constitutional structure implies that the law should be applied without any interpretation (*bouche de la loi*). Nevertheless, it is generally acknowledged that all Chinese judges do actually interpret the law and their decisions are therefore suitable to provide guidance on how to decide similar cases. Other scholars have pointed out that this mechanism is in reality an attempt to improve judicial professionalism by leaving more room for discussion and comparison among the Chinese judiciary.<sup>48</sup>

The lack of a clear binding effect as far as the guiding cases are concerned is not surprising, at least in the so-called civil law countries. If the aim of the mechanism is a better judiciary and a correct and uniform application of law throughout the country, then the persuasive force of such decisions could be sufficient. Accordingly, a judge would not be impeached for ignoring a guiding case, although in doing so his choice would be open to possible criticism from judges and scholars.

The selected cases are, in fact, published and made available to

*“strengthen the consciousness of using guiding cases and properly hear similar cases in light of advanced judicial concepts, fair adjudication yardsticks and scientific trial methods [...] so as to further improve the quality and attach great*

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(217) *The China Quarterly* 121.

47 The People v. Yang Yanhu et al. Case available at <<http://www.lawinfochina.com>>.

48 Jin Zhenbao *Judicial Interpretation and Envisaged Guiding Case Mechanism* at 143 and ss and Ahl, *Retaining Judicial Professionalism* supra n 46.

*importance to case guidance [...] and underscore the directive function of public opinions.*”<sup>49</sup>

If an increasingly professional judiciary can learn how to deal with and use this mechanism, the judicial function could become more transparent, decisions more coherent and the law more predictable.<sup>50</sup>

Judicial professionalism and legal culture are assuming great importance as a necessary premise for heightened judicial competence, and a well-functioning judiciary will improve the Chinese people’s trust in the court system, while at the same time allowing a constructive dialogue with the central government. This in turn could provide not only better protection of Chinese civil rights but also the possibility for the country to see stability and legality progressing hand in hand. Furthermore, channelling disputes to the courts will allow the central government and the CCP itself to monitor and better understand people’s needs, and therefore increase popular consent for their policies.

A stronger judiciary could also allow the development of interpretations of the vague term ‘public interest.’ Scholars have underlined that the lack of a definition of what constitutes public interest is a weak point in the Chinese property rights system and therefore it is unclear which interpretation covers land expropriation.<sup>51</sup> Any comparative analysis would show that many Western countries similarly lack such a definition as it can be expected to change with societal and political developments.<sup>52</sup>

When people consider legal rules to be just and fair, and a judge’s authoritative judicial interpretation is able to fill the gaps in what the law does not say, a virtuous circle can be established. In this way, the CCP will undoubtedly be able to better monitor or address people’s grievances when channelled into the court system. Certainly, it will also have to solve the problem of complaints due to misguided actions by central or local government.

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49 Notice of the Supreme People’s Court on issuing the First Set of Guiding Cases, 20 December 2011, available at <<http://en.pkulaw.cn/display.aspx?id=9126&lib=law&SearchKeyword=guidingcases&SearchCKeyword=>>>.

50 The use of the mechanism in practice will show its reach and how it fits in with other mechanisms such as the retrial system. The latter opens up the possibility of re-deciding a ‘definitive’ case even against the parties’ interest and is anything but a mechanism to achieve legal certainty and predictability.

51 James *Expanding the Gap*, *supra* n 22 at 478.

52 *Ibid.*

## 6. Conclusions

The first decades of legal reform have distanced China from its revolutionary period. However, unprecedented economic growth has also generated negative effects, such as corruption and legal protectionism. It seems plausible that in the wake of the 2008 world financial crisis, China (re)gained confidence in its historical tradition and started to be even more proud of the uniqueness of its development model, strongly avoiding the need to copy from the West. Nevertheless, this did not necessarily entail a return to the past. The principles and reforms adopted with the aim of building a more comprehensive and trustworthy legal system are still effective.

Many scholars point out that illegal land-grabbing is currently the primary cause of widespread violence in rural areas.<sup>53</sup> The fact that peasant unrest began after legal consciousness rose in the country can be seen as an indication that Western concepts such as rule of law, while adapted to the Chinese context, cannot be considered useless or meaningless.

Despite the different context, but nevertheless with an intrinsically similar meaning, the hoisting of the constitutional flag over the roof of a Chongqing ‘nail house’ – a house whose occupant refused to move out to make way for development – is further evidence of the growing extent of the people’s legal awareness. And at the end of November 2012, a similar image gained popularity – that of a Wenling house demolished at the beginning of December 2012.<sup>54</sup>

Stability requires respect for private property (for instance houses built on collective and state land) and for real rights such as land use rights. It is interesting to note that legislation, legal opinions and comments from the central institutions show the central government’s awareness of such problems and its will to solve them. Among the most relevant documents are the Certain Opinions of the Central Committee of the Chinese Communist Party [and the] State Council on promoting the stable development of agriculture and continuing to increase farmers’ income in 2009.<sup>55</sup> The document underlines the Chinese

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53     Erie *China’s (Post-) Socialist Property Rights Regime*, supra n 32; Upham *Chinese Property Rights and Property Theory* supra n 4; Xiaolin Guo (2001) ‘Land Expropriation and Rural Conflict in China’ in *The China Quarterly*, 422; Pils, E (2005-2006) ‘Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan’ in (19) *Columbia Journal of Asian Law* 235.

54     Pictures of such ‘nail houses’ can easily be found on the web.

55     English translation available: Damm-Luhr, T (2010) ‘Certain Opinions of the Central Committee of the Chinese Communist Party [and the] State Council on promoting the stable development of agriculture and continuing to increase farmers’ income

need for self-reliance and the need to expand domestic demand in the countryside.<sup>56</sup>

Due to the key social function of property rights, the government is seriously threatened by peasant unrest. With peasants representing the main working force, support and protection of agriculture should not just be a means of alleviating the pains caused by rapid economic growth, but, in the long run, could also be a means of making the economy grow in a more sustainable way, with the rural population participating in economic growth instead of being threatened by it. Peasants have the potential to become productive agents in China's ongoing economic modernisation. The role of the courts in this context might become crucial in giving some tangible voice to protest and in making the government listen to the groundswell peasant protest. Grievances, if expressed within the judicial system, can encourage the courts to use tools such as judicial interpretation and the guiding case mechanism, eventually defining the public interest by respecting individual interests in a way compatible with competing individual interests.

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in 2009' in (19) *Pacific Rim Law & Policy Journal*, 103.

<sup>56</sup> Id. at 105.

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